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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

SAUL TERRELL,

Defendant and Appellant.

B293828

(Los Angeles County  
Super. Ct. No. VA139595)

APPEAL from a judgment of the Superior Court of  
Los Angeles County, Raul Anthony Sahagun, Judge. Affirmed.

Maggie Shrout, under appointment by the Court of Appeal,  
for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief  
Assistant Attorney General, Lance E. Winters, Assistant Attorney  
General, Michael C. Keller, and Yun K. Lee, Deputy Attorneys  
General, for Plaintiff and Respondent.

Appellant Saul Terrell appeals from the judgment and imposition of his sentence on his convictions of assault with a firearm and kidnapping. Specifically, he challenges the trial court's order imposing a five-year sentencing enhancement under Penal Code<sup>1</sup> section 667, subdivision (a). Appellant requests that we vacate the sentence and remand to the trial court for resentencing in light of Senate Bill No. 1393, which gives the trial court discretion to strike the section 667, subdivision (a) enhancement. As we shall explain, remand would be a futile act. As the record discloses, the parties had an opportunity to argue the merits in the trial court, and the court expressly and clearly stated that even if it had the discretion to do so, it would not strike the section 667, subdivision (a) enhancement. Accordingly, we affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Appellant was arrested and charged with three counts of assault with a firearm (§ 245, subd. (a)(2)); kidnapping (§ 207, subd. (a)); and second degree robbery (§ 212.5, subd. (c)) in connection with a kidnapping, a robbery of a liquor store, and several assaults.<sup>2</sup> The information further alleged that appellant personally used a firearm in connection with the crimes (§ 12022.53, subd. (b); §12022.5, subd. (a)); that appellant had a prior strike conviction pursuant to section 1170.12, subdivision (b) and that he had a serious prior conviction pursuant to section 667, subdivision (a)(1).

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<sup>1</sup> All references to statute are to the Penal Code unless otherwise indicated.

<sup>2</sup> Because the underlying facts of the crimes and trial are not relevant to this appeal, they are omitted.

The jury convicted appellant of all charges and found that appellant personally used a firearm (§§ 12022.53, subd. (b), 12022.5, subd. (a)). The trial court found that appellant had one prior serious felony conviction under the “Three Strikes” law (§ 1170.12, subd. (b)) and section 667, subdivision (a)(1). The court sentenced appellant to an aggregate term of 36 years 4 months, which included 10 years under section 12022.53, subdivision (b), and five years under section 667, subdivision (a).

Appellant filed an appeal of his conviction and sentence, and this court remanded the case for resentencing to allow the trial court to strike the firearm enhancement under Senate Bill No. 620. (See *People v. Terrell* (May 1, 2018, B281605) [nonpub. opn.] .)

On remand, defense counsel asked the trial court to exercise its discretion under Senate Bill No. 620 to strike the 10-year enhancement imposed under Penal Code section 12022.53 and impose a four-year term instead under section 12022.5. Also, defense counsel also pointed out that Senate Bill No. 1393, which gives the trial court discretion to strike the five-year prior conviction enhancement under section 667, subdivision (a) had been signed into law and would become effective in January 2019. Defense counsel opined that Senate Bill No. 1393 would apply retroactively to appellant and, therefore, to avoid a future appeal and remand on the issue, defense counsel asked the court to rule that it would exercise its discretion to strike the prior serious conviction enhancement. The prosecutor argued that in the event Senate Bill No. 1393 applied retroactively, the court should not exercise its discretion to strike the prior, given the circumstances of the current case and the prior conviction.

The court denied the request to strike the 10-year enhancement under Penal Code section 12022.53. Specifically, as to the prior conviction enhancement under section 667, subdivision (a), the court stated: “I don’t think I have discretion to strike it at this time; however, I will have that discretion in the future. If I had the discretion to strike it, the court would not be inclined to strike it. The prior is a recent prior, that is recent relative to the date of [the] offense[s]. And for that reason, the court would not strike the prior if it had the discretion[ary] authority to do so.”

Appellant filed a timely notice of appeal.

### **DISCUSSION**

Before 2019, trial courts had no authority to strike a serious felony prior used to impose a five-year enhancement under section 667, subdivision (a)(1). Senate Bill No. 1393 removed this prohibition. (Stats. 2018, ch. 1013, §§ 1, 2.) The legislation which became effective January 1, 2019, gives trial court’s discretion to strike or dismiss prior serious felony conviction enhancements in “furtherance of justice.” (*Ibid.*)

The parties here agree that the new law applies retroactively to appellant. (See *People v. Jones* (2019) 32 Cal.App.5th 267, 273 [holding that Senate Bill No. 1393 applies retroactively to all defendants whose judgments are not final as of the amendment’s effective date].) Although appellant acknowledges that the trial court stated that it would not strike the prior conviction enhancement if it had the discretion to do so, he argues that he is entitled to a remand for resentencing because he did not have “his day in court to argue the matter” and had “no reason to focus the court on why it should strike the five-year prior.”

We disagree. Appellant asked the trial court to rule on the matter; he argued to the court that it should issue a ruling

indicating that it would strike the prior conviction enhancement if it had the opportunity to do so, while the People opposed the striking the enhancement. The court considered the matter and unequivocally stated that it would deny the request to strike the prior if it had the discretion to do so.

Consequently, appellant already had an opportunity to argue the application of Senate Bill No. 1393 in the trial court and has not articulated to this court how his argument would now be different on remand. We are not required to remand to allow the court to exercise its discretion if “the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the] . . . enhancement” even if it had the discretion. (See *People v. Johnson* (2019) 32 Cal.App.5th 26, 69 [we “need not remand the instant matter if the record shows that the superior court ‘would not . . . have exercised its discretion to lessen the sentence.’ ”]; *People v. McVey* (2018) 24 Cal.App.5th 405, 419 [no remand where, given the trial court’s express consideration of the matter, there appears no possibility that, if the case were remanded, the trial court would exercise its discretion to strike the enhancement].) Based on the record, we conclude there is no possibility the trial court would strike the enhancement were we to remand.

**DISPOSITION**

The judgment is affirmed.

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ROTHSCHILD, P. J.

We concur:

CHANEY, J.

BENDIX, J.